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365-626—69——1

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 569

THE NEW MEXICO STATE GAME COMMISSION,
PETITIONER

v.

WALTER J. HICKEL, SECRETARY OF THE INTERIOR,
ET AL.

No. 919 Misc.

THE NEW MEXICO STATE GAME COMMISSION,
PETITIONER

v.

UNITED STATES COURT OF APPEALS FOR THE TENTH
CIRCUIT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (No. 569, Pet. App. A13–20) is at 410 F. 2d 1197. The opinion of the district court (No. 569, Pet. App. A6–A12) is reported at 281 F. Supp. 627.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1969. On June 13, 1969, the court of appeals denied a petition for rehearing and, alternatively, for the issuance of a writ of mandamus directing the convening of a three-judge district court. On July 17, 1969, the district court denied a petition for the convening of a three-judge court. On September 9, 1969, petitioner filed a motion in this Court for leave to file a petition for a writ of mandamus directing the convening of a three-judge district court. No. 919 Misc. On September 9, 1969, a petition for a writ of certiorari was filed. No. 569. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the convening of a three-judge district court was required to determine petitioner's challenge to the application of federal statutes, where a single judge initially concluded that the relief sought must be granted without having to reach constitutional questions and the reviewing court of appeals, in reversing, implicitly found the constitutional question presented to have been frivolous.

2. Whether federal officials wishing to kill game on federal land in order to study the ecology of the federal land are required first to secure the permission of the state in which the land is located.

3. Whether the contention that the Tenth Amendment to the Constitution requires that the officials secure such permission raises a substantial constitutional issue.

CONSTITUTION AND STATUTES INVOLVED

Article IV, Section 3, clause 2, of the United States Constitution, reads in pertinent part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; * * *.

Article VI, clause 2, of the United States Constitution, reads, in pertinent part:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Act of August 25, 1916, 39 Stat. 535, as amended, 16 U.S.C. 1, 3, reads in pertinent part:

> § 1. There is created in the Department of the Interior a service to be called the National Park Service * * *. The service thus established shall promote and regulate the use of the Federal areas known as national parks * * * by such means and measures as conform to the fundamental purpose of the said parks * * * which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means

as will leave them unimpaired for the enjoyment of future generations.

§ 3. The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service * * *. He may also provide in his discretion for the destruction of such animals and of such plant life as may be detrimental to the use of any of said parks, monuments or reservations. * * *

Section 2282 of Title 28, U.S.C., provides:

§ 2282. Injunction against enforcement of Federal statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

STATEMENT

Carlsbad Caverns National Park, located within New Mexico, belongs to the United States. Congress has placed the administration of the Park in the National Park Service, to be exercised under the direction of the Secretary of the Interior, subject to the provisions of 16 U.S.C. 1, 2–4. 16 U.S.C. 407a.

In December 1967, officials of the Park Service undertook a program to kill a limited number of deer in Carlsbad Caverns National Park pursuant to a

Deer-Range Ecological Study designed to discover if the Park's forage was being overbrowsed, and to obtain other scientific information for use in making decisions affecting the management and administration of the Park and to preserve and protect its lands from injury or damage. This program was explained by the Director of the National Park Service in an affidavit as follows (No. 569, Pet. App. A18–A19):

> That the Dry Season Food Habits of Deer and Deer-Range Relationship research programs which are attached as Exhibits A and B contemplate the killing within the boundaries of Carlsbad Caverns National Park of approximately 50 deer by National Park Service employees. These research programs are absolutely necessary for the proper management and administration of Carlsbad Caverns National Park in order to fulfill the responsibilities and obligations of the Secretary of the Interior and his delegated agents to conserve the scenery, natural and historic objects, and wildlife of the park; and that this research project is required in order that reliable scientific information may be gathered and used as a basis for other decisions affecting the management and administration of the area for the purpose of preserving and protecting the park lands from injury or damage.

The conditions which gave rise to the study were explained in a recommendation of a department biologist (*id.*, A16):

> Mule deer occur throughout the park and are the major consumers of browse, but the park lacks adequate data for a deer management plan. Deer have caused deterioration of choice

> browse plants on most of the park. Their effect on other vegetation, which likely comprises the bulk of the deer diet on most range sites, is unknown. Major fluctuations in deer numbers have apparently occurred over the years, but their relation to available forage and other factors has never been documented. Predation and nearby hunter harvest probably exert only minor control, and deer numbers build to the limit of the forage resource. To avoid serious deterioration of habitat, and damage to associated wildlife, the park must have basic information on deer-range relationships, and a system for routinely determining trend of the deer population and habitat.

When New Mexico officials were advised of the proposed study, they sought to require those who would kill the deer to obtain state permits, which would be readily available for such purposes. The federal officials refused to submit to state jurisdiction in this manner, "[i]nasmuch as this is a Federal project carried out on Federal lands * * *" (No. 919 Misc., Pet. App. A10). The state game commission then brought suit in the United States District Court for the District of New Mexico on stipulated facts (*id.*, A10–A13) for declaratory and injunctive relief against the federal officers concerned. The game commission claimed primarily that federal officials had no federal statutory authority to kill game on federal reserves subject to concurrent state jurisdiction, as is Carlsbad Cavern National Park, unless the killing was for the immediate purpose of protecting the federal property from harm (*id.*, A3). The killing here was to collect information about possible future depredation (*id.*, A14). "[S]olely in the alterna-

tive" (*id.*, A3), the game commission claimed that any statutory authority that might exist would be unconstitutional as an interference with rights reserved to the states and the people by the Tenth Amendment.

Although the district court stated that a three-judge court would be required if the constitutional question was to be reached and were found to be substantial, it and the parties agreed that no such procedure need be followed if the case could be disposed of on statutory grounds alone. On the statutory issue, the court held that federal officials were authorized to kill game only for the immediate purpose of protecting federal property from damage or destruction, so that the killings here, for research into possible future damage and destruction, were unauthorized. It therefore enjoined future unlicensed killing of deer for this purpose by federal officials.

An appeal was taken to the United States Court of Appeals for the Tenth Circuit, which reversed. It found broad statutory authority in the Secretary to conserve scenery and wildlife, which in its view extended to ecological studies such as had been proposed in this case, as well as specific authority to destroy such animals as, "in his discretion," may be "detrimental to the use of any park. 16 U.S.C. § 3." It dismissed the constitutional challenge in a single sentence, as clearly foreclosed by this Court's decision in *Hunt* v. *United States*, 278 U.S. 96. Petitioner then unsuccessfully sought, in the Tenth Circuit, rehearing and mandamus to compel the convening of a three-judge district court and, in the district court, the convening of a three-judge district court.

ARGUMENT

1. The basis for the game commission's claim that a three-judge district court was required in this case is 28 U.S.C. 2282, which forbids the granting of "[a]n interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution * * * unless the application therefor is heard and determined by a district court of three judges." We believe that convening such a court in this case was not required, for several reasons.

a. Unlike the parallel act providing for three-judge district courts in cases involving the possibility of injunctive relief against state officials acting under state law, 28 U.S.C. 2281, Section 2282 refers only to injunctive relief against federal statutes, and not administrative interpretations under those statutes. As this Court recognized in *Jameson & Co.* v. *Morgenthau*, 307 U.S. 171, 173–174, this limitation is a deliberate one. It requires that the constitutionality of an Act of Congress be directly in issue for the three-judge court provision to apply. Here, petitioner does not challenge the general constitutionality of 16 U.S.C. 1, 2–4, which so far as relevant here simply authorize the Secretary to act in a manner consistent with federal interests in conservation. Rather, petitioner alleges that if the Secretary administratively construes his authority as including authority to take the action proposed in this case, then that construction is invalid as offending the Tenth Amendment. But such construction of a statute, involving interpretation of general language in a restricted factual context, is essentially an administrative act. *Ibid.* The constitu-

tionality of the Act of Congress itself is not called into question, and accordingly, the three-judge requirement does not apply.

b. As the Court also recognized in *Jameson,* three judges are not required unless the constitutional question raised is substantial. Putting aside the question whether an argument based on "reserved powers" under the Tenth Amendment is not the equivalent for Section 2282 of the Supremacy Clause argument as to which three judge courts are not required under Section 2281, *Swift & Co.* v. *Wickham,* 382 U.S. 111, the argument as made in this case is plainly insubstantial. Among the tests of insubstantiality are whether an argument's "unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Ex Parte Poresky,* 290 U.S. 30, 32 and cases cited. As we show below, pp. 12–13, and the court of appeals plainly concluded in its summary treatment of the issue, petitioner's argument is clearly foreclosed by the decision of this Court in *Hunt* v. *United States,* 278 U.S. 96. The fact that the court of appeals expressed its conclusion on the merits rather than in terms of insubstantiality is, in the circumstances, simply a formality which does not deprive its judgment of judicial force.

c. This Court has several times stated that the fact that non-constitutional claims are joined with constitutional ones does not suspend application of the three judge requirement. *E.g., Florida Lime and Avocado Growers, Inc.* v. *Jacobsen,* 362 U.S. 73; *Zemel* v. *Rusk,* 381 U.S. 1. Each of these cases, however, has come

before this Court as an appeal from a three-judge district court; in convening that court, it necessarily had been concluded as an initial matter that the cases there involved substantial constitutional questions which the trial court might be required to reach. Here, on the contrary, the trial court initially concluded that he would not have to reach the constitutional questions presented, substantial or not, because in his view petitioners were entitled to the relief they sought on an entirely statutory basis.

Such inquiry is fully as appropriate under Section 2282 as the initial inquiry into the substantiality of the constitutional challenge presented. In terms, Section 2282 requires a three judge court only for cases where injunctive relief is "granted" on constitutional grounds. This Court has frequently stated that the convening of three judge courts is not to be favored, and that accordingly the statutes are to be construed in a technical fashion. *E.g., Swift & Co.* v. *Wickham, supra,* 382 U.S. at 124. Both mandates are satisfied by a construction which permits the single district judge to refrain from convening the extraordinary tribunal if he first determines that the constitutional question will not be reached.[1] The substantiality question is such a determination; so is the determination, made by the district court in this case, that the relief sought can be granted on statutory grounds alone.

[1] We do not contend that he must make such an inquiry. In cases unlike this one, there may be complex factual issues or other reasons to make an initial determination of the non-constitutional grounds inappropriate.

This construction does not give rise to the objection, which was decisive in *Florida Lime and Avocado Growers, supra,* that single judge district courts would be called upon to determine constitutional questions, in contravention of the statute. The single judge's determination is only that the constitutional question need not be reached because the plaintiffs are entitled to relief on other grounds. Should he prove wrong on appeal, and should the constitutional question presented be substantial, a three judge court may be convened at that time. But the court of appeals could determine in reversing the statutory ground, as the court in essence did here, that the constitutional question was not a substantial one, and on that basis order the suit dismissed.

2. The court of appeals correctly interpreted the Secretary's statutory authority as permitting the action he proposes to take in this case—a question as to which there is, in any event, neither conflict among the circuits nor any other matter of importance warranting the grant of certiorari in this case.

The act creating Carlsbad Caverns National Park provides that it is to be administered by the Secretary, through the National Park Service, under the provisions of 16 U.S.C. 1, 2–4. 16 U.S.C. 407a. The provisions of 16 U.S.C. 1 confer broad authority on the Secretary to act "to conserve the scenery and the natural and historic objects and the wildlife therein * * * in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." Under 16 U.S.C. 3, the Secretary is authorized to "provide *in his discretion* for the destruction of

such animals * * * as *may* be detrimental to the use of any * * * parks * * *." (Emphasis supplied.) Whatever questions might arise if the Secretary sought to use this authority, without further legislation, to establish a system of federal game and fishing licenses for use in federal parks, his acts here are entirely consistent with the authority conferred. A limited number of deer are to be killed by federal officers for the purpose of determining their effect upon the ecology of the park. This purpose is plainly within both the Secretary's broad authority to conserve the parks for future generations and his specific mandate to destroy such animals as *may* be detrimental to park use. And the killing of a few deer for this limited purpose does not present the sweeping threat to state game and fishing license revenues on which petitioner and the amicus curiae premise their claims of importance.

3. Petitioner's constitutional claim—that Congress cannot, if so advised, authorize the Secretary to permit the killing of game on federal lands for any other purpose than the immediate protection of federal lands—is insubstantial. Article IV, Section 3, of the Constitution states that "The Congress shall have Power to * * * make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." That power is absolute. *Gibson* v. *Chouteau*, 13 Wall. 92, 99; *Alabama* v. *Texas*, 347 U.S. 272, 273–274. The Supremacy Clause of the Constitution makes clear that in case of any conflict, it is the federal, not the state, law which will prevail; the United States "may perform its functions without

conforming to the police regulations of a State." *Arizona* v. *California,* 283 U.S. 423, 451.

This reasoning has been applied by this Court in circumstances particularly apt here. In *Hunt* v. *United States,* 278 U.S. 96, state game officials challenged the authority of federal officials to kill 10,000 deer in a national forest and preserve which was immediately threatened by overbrowsing. Without having to reach the question whether the government could coopt others to assist it, as by licensing others, this Court tersely and without qualification affirmed the Secretary's authority thus to protect government land:

> * * * the power of the United States to thus protect its lands and property does not admit of doubt [citing cases], *the game laws or any other statute of the state to the contrary notwithstanding.* [*Id.,* 100; emphasis supplied.].

That holding squarely governs here, where the Secretary's purpose was to determine what protection of the government's lands required. Consequently, no substantial constitutional issue is raised.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari and the motion for leave to file a petition for a writ of mandamus to convene a three-judge district court should be denied.

Respectfully submitted.

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